Inch Kenneth Kajang Rubber Public Ltd Co v Tor Peng Sie (t/a Pacific Landmark Real Estate Agents)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1425 OF 2010

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ABU SAMAH, AZIAH ALI AND MAH WENG KWAI JJCA
11 JULY 2013

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Land Law — Sale of land — Agent — Whether real estate negotiator effective cause of sale — Whether agent fulfilled contract by securing purchaser and entitled to commission — Whether agent's role only to source for and introduce purchaser and not to assist/advice client with matters concerning most profitable way to finalise sale

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The appellant, a public-listed company, had appointed the respondent as its sales agent to source for potential buyers or joint-venture parties to purchase or enter into a joint-venture to develop its lands which formed part of the Dunedin Estate. The respondent's employee, PW2, a real estate negotiator, introduced Island & Peninsular Bhd ('I & P') as an interested purchaser to the appellant and following talks between I & P and the appellant the latter signed a sale and purchase agreement ('SPA') with I & P's wholly-owned subsidiary, I & P Menara Sdn Bhd, for the sale of 405 acres out of the total 1006 acres of the estate at a price of RM4.60 per square foot (psf). Whilst the letter appointing the respondent did not state the sale price the appellant wanted, it provided that the respondent's fee would be1% of the total sale price when the SPA was completed together with 5% service tax on the total fees paid. Upon completion of the SPA in the instant case, the respondent submitted its claim for fees and service tax but the appellant failed to make payment despite reminders. In its defence to the respondent's suit in the High Court for recovery of the fees and service tax, the appellant claimed an oral agreement existed between its director and executive chairman, DW1, and PW2 that the respondent's fees would only be payable if the whole of the estate was sold at a minimum price of RM5 psf and that as those conditions were not fulfilled no fees was payable. The appellant further contended that apart from merely introducing I & P to the appellant, the respondent failed to carry out the scope of duties expected of an estate agent to help conclude the sale. The High Court allowed the respondent's claim but limited the judgment sum to RM500,000 on a quantum meruit basis on the ground the whole of the estate was not sold; that DW1 had to do substantial amount of work himself to complete the sale and that the sale price per square foot was less than what was intended. The appellant appealed against the decision to the Court of Appeal whilst the

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A respondent cross-appealed against that part of the decision limiting the judgment sum to RM500,000.

Held, dismissing the appeal and allowing the cross-appeal:

B (1) The court was satisfied on balance of probabilities that the appellant had not set as a precondition that the respondent had to secure a purchaser at a minimum price of RM5 psf in order to be entitled to claim its fees. No contemporaneous documentary evidence, either before and after the letter of appointment was signed, was tendered in court to support that contention (see para 27(g)).

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(2) It seemed to the court that the minimum price requirement raised by the appellant was an afterthought as the appellant never once wrote to the respondent to inform it was not entitled to be paid as the minimum price requirement had not been met. In fact, the appellant never responded to

D any of the respondent's letters to deny or dispute its claim for professional fees. If the minimum price was a precondition it was incumbent on the appellant to have spelt it out in no uncertain terms in the letter of appointment so that the respondent would have known in advance what its obligations were (see para 27(j)).

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(3) PW2 was the effective cause in bringing the parties together. Upon PW2 securing a purchaser for the appellant, the event envisaged in the letter of appointment — minus the minimum price of RM5 psf requirement — had happened and by operation of s 33 of the Contracts Act 1950, the

F contingent contract became enforceable by law and the respondent was entitled to its commission (see para 27(i)).

(4) Having found that PW2 was the effective cause of the transaction, the High Court should have awarded the full sum claimed by the respondent. The reasons relied on by the trial judge to reduce the award to

G RM500,000 was incorrect as it was inconsistent with her findings of fact and the law on the issue of liability which was decided in favour of the respondent. Furthermore, the sum of RM500,000 was arbitrary and no basis or reasons were given to support that figure (see paras 30(a)–(b) & 31).

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(5) It was obvious from the letter of appointment that the sale of the whole 1,006 acres of Dunedin Estate as one piece was not in the contemplation of the parties. Nowhere in the evidence was it established that the sale of the whole estate was a condition precedent to be fulfilled before the

I respondent would be entitled to be paid its professional fees (see para 28(h)).

(6) PW2 was a mere estate agent negotiator whose job was to source for and introduce potential purchasers for the land. She was not a qualified and licensed person to have given the kind of information and assistance

DW1 sought in order to conclude the sale with I & P. The proposals forwarded by I & P showed it was not a straight-forward SPA but involved 'high finance' and complex financial transactions for which DW1 should have looked to his financial and economic advisers and hard-nosed businessmen for advice and assistance and not to PW2 (see para 29(g)–(h)).

[Bahasa Malaysia summary

Perayu, syarikat senarai awam, telah melantik responden sebagai ejen jualannya untuk mencari pembeli-pembeli berpotensi atau pihak-pihak usaha sama untuk membeli atau memasuki satu usaha sama bagi membangunkan tanahnya yang membentuk sebahagian Estet Dunedin. Pekerja responden, PW2, seorang perunding hartanah, telah memperkenalkan Island & Peninsular Bhd ('I & P') sebagai pembeli berkepentingan kepada perayu dan berikutan perbincangan antara I & P dan perayu, perayu telah menandatangani satu perjanjian jual beli ('PJB') dengan anak syarikat I & P yang dimiliki penuh, I & P Menara Sdn Bhd, bagi jualan 405 ekar daripada jumlah 1006 ekar estet pada nilai RM4.60 kaki persegi ('kps'). Walaupun surat melantik responden tidak menyatakan harga jualan yang perayu mahukan, ia memperuntukkan bahawa fi responden adalah 1% daripada jumlah harga jualan apabila PJB disempurnakan dengan cukai perkhidmatan sebanyak 5% daripada jumlah fi yang dibayar. Dengan penyempurnaan PJB dalam kes ini, responden menuntut fi dan cukai perkhidmatan tetapi perayu gagal membuat pembayaran walaupun peringatan telah diberikan. Dalam pembelaannya terhadap tindakan responden di Mahkamah Tinggi bagi pemulangan semula fi dan cukai perkhidmatan, perayu mendakwa bahawa wujud perjanjian lisan antara pengarahnya dengan pengerusi eksekutif, DW1, dan PW2 bahawa fi responden hanya akan perlu dibayar sekiranya keseluruhan estet dijual pada harga minima RM5 kps dan memandangkan syarat-syarat tersebut tidak dipenuhi, tiada fi yang perlu dibayar. Perayu seterusnya menghujahkan bahawa selain daripada sekadar memperkenalkan I & P kepada perayu, responden gagal menjalankan skop kewajipan yang dijangka daripada seorang ejen hartanah untuk menutup jualan. Mahkamah Tinggi membenarkan tuntutan responden tetapi mengehadkan jumlah penghakiman kepada RM500,000 atas dasar *quantum meruit* dengan alasan bahawa keseluruhan estet tersebut tidak dijual; bahawa DW1 terpaksa melakukan sebahagian besar kerja dengan sendiri untuk menyempurnakan jualan dan bahawa harga jualan kaki persegi adalah kurang daripada yang dimaksudkan. Perayu merayu terhadap keputusan Mahkamah Rayuan manakala responden membuat rayuan balas terhadap bahagian keputusan yang mengehadkan jumlah penghakiman kepada RM500,000.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

(1) Mahkamah berpuas hati atas imbangan kebarangkalian bahawa perayu

tidak meletakkan pra-syarat yang mana responden perlu mendapatkan pembeli dengan harga minima RM5 kps untuk mendapatkan hak ke atas tuntutan fi. Tiada keterangan dokumentar semasa, sama ada sebelum dan selepas surat pelantikan ditandatangani, telah dikemukakan di mahkamah untuk menyokong hujahan tersebut (lihat perenggan 27(g)).

(2) Pada mahkamah syarat harga minima yang dibangkitkan oleh perayu adalah satu fikir semula kerana perayu tidak pernah sekali pun menulis kepada responden untuk memaklumkannya bahawa ia tidak berhak dibayar kerana syarat harga minima tidak dipenuhi. Malahan, perayu tidak pernah membalas mana-mana surat untuk menafikan atau mempertikaikan tuntutannya bagi fi profesional. Jika harga minima merupakan pra-syarat, adalah menjadi kewajipan perayu untuk menggariskannya dalam mana-mana terma tetap dalam surat pelantikan agar responden tahu kewajipan-kewajipannya terlebih dahulu (lihat perenggan 27(j)).

(3) PW2 adalah sebab efektif dalam membawa pihak-pihak bersama. Apabila PW2 mendapatkan pembeli untuk perayu, kejadian yang digambarkan dalam surat pelantikan — tanpa keperluan harga minima RM5 kps — telah berlaku dan melalui operasi s 33 Akta Kontrak 1950, kontrak kontingen tersebut boleh dikuatkuasakan oleh undang-undang dan responden berhak ke atas komisyen (lihat perenggan 27(i)).

(4) Setelah mendapati bahawa PW2 adalah kausa efektif dalam transaksi, Mahkamah Tinggi sewajarnya mengawardkan jumlah penuh yang dituntut oleh responden. Sebab yang disandarkan oleh hakim bicara untuk mengurangkan award kepada RM500,000 adalah tidak betul kerana ia tidak konsisten dengan dapatan fakta dan undang-undang mengenai isu liabiliti yang diputuskan berpihak kepada responden. Tambahan lagi, jumlah RM500,000 adalah jumlah sebarangan dan tiada asas atau sebab yang diberikan untuk menyokong jumlah tersebut (lihat perenggan 30(a)–(b) & 31).

(5) Adalah jelas daripada surat pelantikan bahawa jualan keseluruhan 1,006 ekar daripada Estet Dunedin sebagai satu bidang bukanlah niat pihak-pihak. Tiada mana-mana dalam keterangan yang menetapkan bahawa jualan keseluruhan estet adalah pra-syarat yang perlu dipenuhi sebelum responden berhak untuk dibayar fi profesional (lihat perenggan 28(h)).

(6) PW2 cuma sekadar ejen perunding yang mana tugasnya adalah untuk mencari dan memperkenalkan pembeli-pembeli berpotensi bagi tanah. Dia bukanlah seorang yang berkelayakan dan berlesen untuk memberi maklumat dan bantuan yang diperlukan oleh DW1 untuk menutup jualan dengan I & P. Cadangan-cadangan yang diusulkan oleh I & P menunjukkan bahawa ia bukanlah PJB mudah tetapi melibatkan

'kewangan tinggi' dan transaksi kewangan yang kompleks yang mana DW1 sepatutnya merujuk kepada penasihat-penasihat kewangan dan ekonomi dan ahli-ahli perniagaan yang tegas bagi nasihat dan bantuan dan bukan kepada PW2 (lihat perenggan 29(g)–(h)).]

Notes

For cases on agent, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4578–4586.

Cases referred to

Chew Teng Cheong & Anor v Pang Choon Kong [1981] 1 MLJ 298, FC (refd)
Luxor (Eastbourne) Ltd and others v Cooper [1941] AC 108, HL (refd)
McNeil v Law Union and Rock Insurance Co Ltd (1925) 23 Ll L Rep 314, KBD (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Tang Chioksing v Lian Fatt Sawmill Co [1976] 2 MLJ 241, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (consd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425; [2010] 4 CLJ 203, CA (refd)

Legislation referred to

Contracts Act 1950 ss 33, 71
Evidence Act 1950 s 92(b), (c)
National Land Code s 263

Appeal from: Suit No S1–22–253 of 2005 (High Court, Kuala Lumpur)

Yee Mei Ken (Shearn Delamore & Co) for the appellant.
Ramdas Tikamdas (Siva, Ram & Associates) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

SALIENT FACTS

[1] The appellant is a public listed company and was at all material times the registered owner of land held under Geran 44133, Lot Nos 5319, 571 and 1196 Mukim Semenyih, Daerah Ulu Langat, Selangor which formed part of an estate known as Dunedin Estate.

[2] The respondent is a registered real estate agent carrying on business as a sole proprietor under the name and style of Pacific Landmark Real Estate Agents.

[3] On 19 April 1999 the respondent employed one Rachel Yip Kwai Nyok ('PW2') as a senior real estate negotiator authorised to act on behalf of the firm.

[4] Towards the end of 1999 and in early 2000, PW2 contacted one Tuan Hj Mohd Arif bin Taib ('DW1') the then director and executive chairman of the appellant, to inquire if the appellant would be interested to sell its lands or to enter into a joint venture business and if so, to be appointed by the appellant as its sales agent.

[5] Sometime in October 2000, DW1 expressed interest in PW2's proposal and consented to PW2 proceeding to look for potential purchasers or joint venture parties for the sale and purchase or joint development of the appellant's lands. DW1 handed over copies of plans for the Dunedin Estate as well as its' Kajang Estate to PW2.

[6] PW2 thereafter proceeded to source for interested parties and managed to secure two potential purchasers namely, Island & Peninsular Bhd and SP Setia Bhd.

[7] On 5 December 2000, PW2 with the permission of DW1, took some officers of Island & Peninsular Bhd on a site inspection of the Dunedin Estate.

[8] A week later on 12 December 2000, the appellant formally appointed the respondent in writing as its sales agent (see *rekod rayuan* pp 417–418).

[9] Following the introduction of Island & Peninsular Bhd to the appellant, the appellant entered into an agreement with Island & Peninsular Menara Sdn Bhd a wholly owned subsidiary of Island & Peninsular Bhd on 16 November 2001 for the sale and purchase of part of Dunedin Estate comprising of 405 acres out of 1006 acres, at RM4.60 per sqft thereby totaling RM81,279,719. The sale price was subsequently adjusted and reduced to RM79,726,274 vide a supplementary agreement dated 27 December 2002.

THE RESPONDENT'S CLAIM

[10] The respondent's claim against the appellant is for professional fees for services rendered and work done in introducing Island & Peninsular Bhd as the interested purchaser of part of Dunedin Estate pursuant to the letter of appointment dated 12 December 2000. The sale and purchase agreement was eventually entered into on 16 November 2001 between the appellant and Island & Peninsular Menara Sdn Bhd.

[11] The letter of appointment appointed the respondent as the 'ad hoc' sales

agent for the outright sale or joint venture of the whole of Dunedin Estate upon, inter alia, the following terms:

(a) the appellant agreed to pay to the respondent 'one per centum (1%) of the total sale price of *each individual transaction* and payable in full upon completion of the Sale and Purchase Agreement' as commission or fees;

(b) the appellant also agreed to pay the respondent's service tax at 5% of the total fees received; and

(c) the respondent's appointment shall be valid for six months from the date of appointment. The fees shall be payable if an introduction is made during the period of appointment which leads to any successful sale or joint venture within one year after the expiry or termination of the appointment.

[12] The respondent claimed the total sum of RM837,125.88 being the fees of RM797.262 calculated at 1% of the reduced sale price of RM79,726,274.29 and service tax of RM39,863.14 calculated at 5% of the fees.

[13] The sale and purchase transaction between the appellant and Island & Peninsular Menara Sdn Bhd was completed on or about 14 December 2004 when the last instalment of the purchase price was paid.

THE APPELLANT'S DEFENCE

[14] The pleaded defence of the appellant was that before the letter of appointment dated 12 December 2000 was signed by DW1, it was orally agreed between DW1 and PW2 that the respondent's fees would only be payable if firstly, the sale price obtained was at a minimum of RM5 per sqft and secondly, if the whole of Dunedin Estate comprising 1006 acres was to be sold. The appellant contended that as only a part of Dunedin Estate comprising 405 acres was sold to Island & Peninsular Menara Sdn Bhd at the price of RM4.60 per sqft the respondent was therefore not entitled to be paid the fees claimed or any part thereof.

[15] The appellant further contended that PW2 apart from introducing Island & Peninsular Bhd as the intended purchaser, did not carry out the respondent's scope of duties as an estate agent to help conclude the sale and purchase transaction.

A TRIAL IN THE HIGH COURT AND DECISION OF THE LEARNED JUDGE

[16] The case proceeded to full trial with the respondent calling two witnesses namely, the respondent himself as PW1 and Rachel Yip as PW2. The appellant called DW1 as its only witness.

[17] The learned judge in her decision allowed the respondent's claim for professional fees but limited the sum to RM500,000 only.

[18] In allowing the claim the learned judge held that the introduction of Island & Peninsular Bhd by PW2 to DW1 was the effective cause for the sale and purchase agreement being entered into between the appellant and Island & Peninsular Menara Sdn Bhd.

[19] The learned judge did not accept the oral evidence of DW1 that there were discussions between himself and PW2 before the letter of appointment was signed to the effect that it was orally agreed between DW1 and PW2 that PW2 would secure a purchaser at a minimum price of RM5 per sqft failing which the respondent would not be entitled to be paid the professional fees. In any event, the learned judge proceeded to hold that even if there were discussions on the price of the land to be sold, there was nothing on record to suggest that the minimum price of RM5 per sqft was a condition precedent for the payment of the respondent's fees.

[20] The learned judge also held that it was not contemplated by the parties that the whole of Dunedin Estate comprising of 1006 acres 'would be sold as one piece nor is it commercially realistic in the circumstances'. Hence the appellant could not support its case that unless the respondent sold the whole of the Dunedin Estate, the respondent would not be entitled to be paid.

[21] Finally, the learned judge held that there was a lack of contemporaneous documentary evidence to show that the respondent did not fulfill its part of the obligations under the letter of appointment.

[22] In limiting the judgment sum to RM500,000 the learned judge apparently awarded the sum on a quantum merit basis as it was noted by the learned judge that not the whole of Dunedin Estate was sold and that the appellant through DW1 had to do a substantial amount of ground work to complete the sale and that too at a reduced sale price.

THE APPEAL AND CROSS-APPEAL

[23] Being dissatisfied with the decision of the learned judge, the appellant appealed against the order allowing the respondent's claim and the respondent in turn appealed against that part of the order reducing the judgment sum to RM500,000.

DECISION OF THE COURT

[24] Upon reading the record of appeal, the written submissions and authorities cited by counsel for the appellant and for the respondent and upon hearing the oral submissions of counsel aforesaid, the court unanimously dismissed the appellant's appeal with costs and allowed the respondent's cross-appeal with costs.

[25] The appellant has now applied for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[26] Essentially, in this appeal there were three issues to be determined by the court namely:

(a) whether the respondent was in breach of the terms of the letter of appointment by failing to secure a purchaser at the minimum price of RM5 per sqft;

(b) whether the respondent was in breach of the terms of the letter of appointment by failing to secure a purchaser for the whole of the Dunedin Estate; and

(c) whether the respondent had failed to perform its duties and obligations as a real estate agent.

And in the cross-appeal the only issue was whether the learned judge was correct in awarding RM500,000 only for the services rendered by the respondent.

[27] Issue 1 — The minimum price point:

(a) it was contended by the appellant that before the letter of appointment was signed, it had been orally agreed between DW1 and PW2 that the sale price must be at a minimum of RM5 per sqft. DW1 in his evidence testified that at the several meetings with PW2 the price was discussed and it was made known to PW2 that the appellant was looking at a

minimum price of RM5 per sqft. DW1 said that PW2 had even informed him that she would be able to source for potential buyers at RM6 per sqft;

(b) PW2 in her evidence seemed to suggest that DW1 did not discuss the price with her let alone set a minimum price for the sale. It was the respondent's contention that the minimum price was never discussed at all and that the appellant was raising it for the first time in their defence;

(c) the court is of the view that the proposed sale price of Dunedin Estate must have been discussed between DW1 and PW2 before the letter of appointment was signed. Otherwise, it would be an affront to common sense for DW1 to have authorised PW2 to source for potential purchasers or joint venture partners without stating the price that the appellant hoped to fetch. Surely, the discussions could not have been held *in vacuo* and it would have been extremely surprising for an estate agent not to find out the asking price of a vendor. On this point, the court is satisfied that DW1 must have had discussions with PW2 and informed her to source for interested purchasers or joint venture partners at a certain price;

(d) the learned judge, in agreement with the contention of counsel for the respondent, held that the appellant was not permitted to introduce oral evidence in respect of the written letter of appointment pursuant to the principles in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229. In *Tindok Besar Estate* the court in allowing the appeal held that the parol evidence was wrongly admitted by the trial judge as the evidence did not fall within either proviso (b) or proviso (c) of s 92 of the Evidence Act 1950 but was evidence adding a new term or terms of the agreement.

Section 92(b) and (c) read as follows —

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

(e) in the present case, we are of the view that the evidence of DW1 that there were discussions between PW2 and himself on the price generally and the minimum price in particular ought to have been considered by the learned judge as the purported discussions appear to come within the

ambit of provisos (b) and (c) of s 92 of the Evidence Act 1950 in that there was an oral agreement to include the minimum price at RM5 per sqft in the letter of appointment;

(f) but, having said that, we are of the considered view that there was insufficient evidence to have the discussions on the minimum price cast as a condition precedent in the appointment of the respondent;

(g) the court is not satisfied on a balance of probabilities, that the appellant had set a pre condition to the appointment of the respondent in that the respondent must secure a purchaser at a minimum price of RM5 per sqft, failing which the respondent would not be entitled to claim for its fees. To begin with, other than what was stated by DW1 in evidence and that this point was pleaded in para 5 of the defence, there was absolutely no contemporaneous documentary evidence, both before and after the letter of appointment was signed, tendered in court to support the appellant's contention. DW1 in his evidence sought to establish that there was an earlier appointment letter, prior to the letter of appointment of 12 December 2000, given to the respondent and in that letter the minimum price of RM5 per sqft was stated. However this 'earlier letter' was not referred to in the defence nor tendered in evidence. The minimum price was of course not an agreed fact included in the statement of agreed facts;

(h) a distinction must be drawn between discussions on price generally and a minimum price in particular, and the setting of a minimum price as a condition precedent for the respondent to meet before the appellant is obliged to pay its fees;

(i) it will be noted that the letter of appointment, an internal document between the appellant and the respondent was ominously silent on the price. DW1 in explaining why no price was stated in the letter of appointment tried to justify the omission by saying that a minimum price may hinder or deter any potential purchasers from offering a higher price! This explanation does not hold water especially since for example, in foreclosure proceedings there is statutory provision to fix a reserve price for the purpose of the sale of land by public auction under s 263 of the National Land Code. With a reserve price a potential bidder will know that he has to improve on that price, but this will not deter any bidders from raising their bids. Similarly in this case, even if the potential purchasers were made aware of the minimum price of RM5 per sqft we do not see how that information could have hindered or deterred them from increasing their price, if they were really interested in purchasing the estate. In any event as stated earlier, the letter of appointment was an internal document and it was incumbent on the appellant to spell out the condition precedent in no uncertain terms in the letter of appointment so that the respondent would have known in advance without qualification

what its obligations were. The court is of the view that upon PW2 securing a purchaser for the appellant, the event envisaged in the letter of appointment, minus the minimum price of RM5 per sqft requirement, had happened and by operation of s 33 of the Contracts Act 1950 the contingent contract became enforceable by law; and

(j) it seems to the court that the minimum price requirement by the appellant was raised as an afterthought. Even after the sale and purchase agreement was executed on 16 November 2001 wherein the sale price was fixed at RM4.60 per sqft the appellant never once wrote to the respondent to inform the respondent that it was not entitled to be paid as the minimum price of RM5 per sqft had not been met. On the other hand, the record shows that the respondent had written numerous letters to the appellant reminding them of the letter of appointment, the services rendered and their requests for payment. Yet the appellant never once replied to say that they were not paying because the condition precedent had not been met.

[28] Issue 2 — Sale of part of Dunedin Estate point:

(a) the caption in the letter of appointment of 12 December 2000 stated 'Proposed outright sale or joint venture for Agricultural Land held under 'Dunedin Estate' — Lots 1195 and 1196 Mukim of Semenyih, Daerah of Hulu Langat Selangor Darul Ehsan @ approx 1006 acres';

(b) it will be observed that the caption referred to two lots only namely, Lots 1195 and 1196. However, nowhere in evidence was it established by the appellant the total number of lots which made up Dunedin Estate, that were up for sale;

(c) the appellant, apart from complaining that the respondent had failed to sell the whole of Dunedin Estate comprising of 1006 acres unfortunately failed to establish in evidence which part of the estate that was sold and which was not;

(d) the need to know becomes apparent when considering the valuation report dated 6 July 2001 prepared by Rahim & Co which was commissioned by the appellant. In the summary of report at p (i) of the report (*rekod rayuan* pp 353–397) the subject property is described as 'a 402.46 acre land forming part of the Dunedin Division of Kajang Estate' held under 'Parent Lots and Titles: Lot Nos. 5319, 571 and 1196 which are held under the Title No. Geran 44133 and Lot No. 540 which is held under Title No GL 6661, Mukim of Semenyih, District of Ulu Langat, Selangor'. The titled land area (whole estate) is said to be 1,007.303 acres;

(e) from the above, it can be seen that Lot 1195 is not one of the lots listed under 'Parent Lots and Titles'. In any event, the valuation report was only in respect of the 402.46 acres forming part of the Dunedin Division of

Kajang Estate, which was valued for purposes of the sale. Now, quite obviously by this report, the appellant only intended to sell 402.46 acres being the Dunedin Division of Kajang Estate and not the whole of 1,007.303 acres;

(f) as mentioned earlier, it was not established by the appellant what in fact was to be sold by the respondent exactly at the time of the letter of appointment. The lots sold eventually under the sale and purchase agreement have not been clarified as the sale and purchase agreement was not produced in evidence by the appellant. All that the court was informed was that an area of 450 acres was sold. Bearing in mind the subject property referred to in the valuation report only comprised of 402.46 acres, it may even appear that the appellant had sold land not referred to in the report;

(g) for the appellant to now say that the respondent was in breach of the letter of appointment by failing to sell the whole of the 1006 acres is an invidious argument. To begin with, the appellant has failed to establish the exact subject property that the respondent was to sell. Secondly, cl 1 of the letter of appointment under 'Outright Sale' speaks of 'One per centum (1%) of the total sale price for each individual transaction …'. This clause to our minds, envisaged the sale of the whole of Dunedin Estate or a part of it. It is obvious that Dunedin Estate was held under separate grants of title comprising the various lots and not just under one title. 'Individual transactions' imply or could mean that there may be more than one sale and purchase transaction and if that was the case, the respondent cannot be faulted for not selling the whole of the estate; and

(h) while the court may not necessarily agree with the view of the learned judge that it was not commercially realistic in the circumstances to sell the estate in one piece, it is obvious from a close reading of the letter of appointment, it was not in the contemplation of the parties that the whole of the 1006 acres of Dunedin Estate would be sold as one piece. Again, it will be noted that nowhere in the evidence was it established that the sale of the whole of Dunedin Estate was a condition precedent to be fulfilled by the respondent before the respondent would be entitled to be paid its professional fees. This condition is a second afterthought by the appellant. It cannot be gainsaid that any party to a contract intending to rely on a condition precedent must clearly state the condition to be fulfilled and which must be expressly brought to the attention of the other party.

[29] Issue 3 — The non-performance point:

(a) it was not seriously disputed by the appellant that it was PW2 who had introduced Island & Peninsular Bhd as a potential purchaser to them. If not for the introduction of Island & Peninsular Bhd by PW2, it is obvious that no sale and purchase agreement would have been entered into between the appellant and Island & Peninsular Menara Sdn Bhd, a wholly owned subsidiary of Island & Peninsular Bhd. It cannot be denied that PW2 was the effective cause in bringing the parties together.
In the Federal Court case of *Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298, it was held by Raja Azlan Shah CJ (Malaya) that:

> Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. 'The effectiveness of the agent's work is a matter of inference from the evidence' per Mc Gregor J, in *Sushames v Cumming*. Where the agent can show that some act of his was the causa causans of the transaction (*Tribe v Taylor*) or was an efficient cause of the sale (*Millar v Radford*), he is entitled to his agreed remuneration.

(b) similarly, taking a page from insurance law, in insurance contracts the law is settled that where an agent is the 'efficient cause of the transaction', the agent would be entitled to his commission. See the case of *McNeil v Law Union and Rock Insurance Co Ltd* (1925) 23 Ll L Rep 314 (Vol 23, *Llyod's List Law Reports* — Dec 31, 1925 p 314) where Branson J dealt with the principle of the 'efficient cause of the transaction' as follows:

> The principle deducible from that is this:
>
> Where an agent is asking for commission upon a certain transaction, he has got to show that he was an efficient cause of the transaction coming about. It is not enough, to show that the was the introducer of the two parties because that is merely a causa sine qua non and may not be the efficient cause.
>
> Now in the present case it is said on behalf of the plaintiff that he was the efficient cause of the bringing about of his renewal. There is no doubt that he did a good deal of work … and his efforts, in my view of the facts, were an efficient cause in the ultimate renewal of this policy. They were not the only cause, but they were an efficient cause.

(c) further, in *The Law of Insurance Broking* by Christopher Henley the issue of 'introduction by an agent' was discussed by the author in the following terms:

> Thus a single introducing agent, who introduces a buyer who subsequently enters into the transaction as a result of that introduction, will prima facie be entitled to his commission, and issues of causation are of limited importance.

An introduction which secures a successful result will 'not prevent effective causation even if the purchase would have become the purchaser without the intervention of the agent or that the principal's own efforts were also an effective cause of the sale'. The nature and extent of the broker's obligations is always a question of fact.

(d) however, what the appellant was contending was that PW2 failed and/or omitted to, inter alia, take part in the negotiations that led to the execution of the sale and purchase agreement; that PW2 failed 'to conduct negotiations, give advice, discuss documents and agreements, promote the land, obtain valuation reports, consultants' reports and other important information' (see question and answer No 87 of DW1's written statement at *rekod rayuan* p 271). And as a result of PW2's non-performance of her scope of duties/work, DW1 had to do most of the 'ground work' himself in the negotiations with Island & Peninsular Bhd. Further the appellant complained that the respondent had failed to comply or meet with the standards set by the Malaysian Estate Agency Standards. Unfortunately, the court was not appraised of the said standards as the appellant had failed to assist the court by producing a copy of the same. Anyhow, it was the appellant's contention that as PW2 had not performed her obligations, the respondent was not entitled to be paid;

(e) in the course of the negotiations between DW1 and Island & Peninsular Bhd, a letter dated 2 April 2001 (see *rekod rayuan* p 351) was sent by Island & Peninsular Bhd to the appellant setting out four proposals in respect of the acquisition of Dunedin Estate;

(f) to emphasise the importance and complexity of the proposals, the said four proposals are set out in extenso for ease of reference. They are:

(a)

Proposal 1: Outright Purchase

The proposal involves outright purchase of the entire estate. The consideration can be based on a valuation to be undertaken by a mutually agreed independent valuer.

(b)

Proposal 2: Partial Outright Purchase

This proposal involves Island & Peninsular Bhd buying a part of the land based on open market value as determined under (a) above. 300 to 400 acres, would be of interest to us.

(c)

Proposal 3: Partial Outright Purchase, Partial Joint- Venture

This proposal is an extension of (b) with the balance of the area not taken by Island & Peninsular Bhd, to be developed by a joint-venture company formed by our two companies with us holding a slight majority.

(d)

Proposal 4: Joint-Venture

From the onset I & P and Inch Kenneth will establish a joint venture company with Island & Peninsular Bhd holding majority equity, say, Island & Peninsular Bhd 60%: Inch Kenneth 40%.

The JVC will purchase the estate from Inch Kenneth above and then develop it accordingly.

(g) a perusal of the proposals will clearly show that DW1 and Island & Peninsular Bhd were discussing not just a straight forward sale and purchase transaction, but 'high finance' and complex financial transactions. Yet in question and answer Nos 133–135 of his witness statement DW1 said that PW2 failed to assist or advise him in the meetings and negotiations and that PW2 was supposed to lead the negotiations and come up with write ups or prospectus. On the four proposals DW1 lamented that 'she should have advised me on the more profitable move. She was supposed to lead the negotiations. This was a complex transaction. There were many possibilities on what could be done with the land. We relied on the Plaintiff's expertise to lead the way and advise us on the best options';

(h) to say the least, the answers by DW1 were most startling and revealed his naivety in the whole episode. For the kind of assistance and advice required, DW1 should have been looking towards his financial and economic advisers and hard-nosed businessmen and not to PW2 who after all was a mere estate agent negotiator employed by the respondent, to source for and *introduce* potential purchasers for the land;

(i) again in question and answer no 138, DW1 said PW2 should have obtained information, for example, the surrounding infrastructure, the potential of the land, accessibility, information regarding surrounding areas and future development plans for that area by the relevant authorities'. Obviously, DW1 had overlooked the reality of the situation in that PW2 was a negotiator and not a land surveyor or valuer. In any event PW2 is not a qualified and licensed person to have given the kind of information sought by DW1. She could not;

(j) on her part PW2 testified in evidence that she had performed her obligations and duties as the sales agent who had brought the parties

together and who entered into the sale and purchase agreement namely:

(i) even before the letter of appointment was signed sometime in October 2000, PW2 had obtained the plans, location and key plans and topographical plans and contour plans for Lots 5319, 5712, 1196 and 540, Mukim Semenyih, District of Hulu Langat and forwarded them to Island & Peninsular Bhd and SP Setia Bhd for their consideration;

(ii) facilitated a site inspection by Island & Peninsular Bhd on 5 December 2000 (see *rekod rayuan* p 460);

(iii) on 19 December 2000 PW2 arranged for a meeting at the Equatorial Hotel to introduce the officers of Island & Peninsular Bhd to DW1; and

(iv) PW2 obtained copies of the title deeds and the appellant's statements of accounts and handed them to Island & Peninsular Bhd under cover of letter dated 8 January 2001 (see *rekod rayuan* p 461).

(k) after the initial introduction on 19 December 2000 and after it became apparent that the negotiations were progressing positively between the appellant and Island & Peninsular Bhd, the respondent wrote to the appellant two letters dated 12 March 2001 (see *rekod rayuan* p 419) and 17 October 2001 giving notice that upon the successful completion of any sale or joint venture agreement, the respondent would be entitled to its fees;

(l) on 24 January 2002 the respondent wrote to the appellant giving notice that with the execution of the sale and purchase agreement the respondent had fulfilled the terms of the appointment and would be entitled to the fees upon completion of the sale and purchase agreement;

(m) again on 8 April 2003, the respondent wrote another letter to the appellant reminding them that the fees would be due and payable upon completion of the sale and purchase agreement on 6 February 2005;

(n) finally, on the early completion of the sale and purchase agreement on or about 14 December 2004 the respondent wrote a letter dated 11 January 2005 together with a note of fee requesting for payment of the fees and service tax;

(o) thereafter the respondent sent two further reminders to the appellant requesting for payment;

(p) it will be noted that the appellant failed and/or omitted to respond to any of the respondent's letters listed above at all to deny or dispute the respondent's requests and later demands for payment of its profesional fees. Importantly, the appellant never stated their case to the respondent

that as PW2 did not perform her obligations and duties, the appellant would not be obliged to pay. The silence on the part of the appellant was deafening. This line of defence of non-performance by PW2 would appear to be the third afterthought; and

(q) in *Tang Chiok Sing v Lian Fatt Sawmill Co* [1976] 2 MLJ 241 (FC), Lee Hun Hoe CJ (Borneo) in delivering the judgment of the court held that the 'principal's liability to pay commission depends on whether, on the proper construction of the contract between him and the agent, the event has happened upon which the commission is to be paid'. Here, the event has happened in that the sale and purchase agreement had been entered into. While it was held by Lord Russell of Killowen in the leading case of *Luxor (Eastbourne) Ltd and others v Cooper* [1941] AC 108 that commission contracts are subject to no peculiar rules or principles of their own and that no general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined, the accepted position in cases involving agent's commission is that the principal is only bound to pay commission if and when the agent has brought about the intended result. Once PW2 had brought the parties together the respondent was entitled to its commission. In the present circumstances, it would be inequitable for the appellant to refuse to pay the commission.

[30] The cross-appeal issue — the award of RM500,000 point:

(a) the court agrees with the learned judge that PW2 was the effective cause of the transaction. Having made that finding it behoves the court to award the full sum as claimed by the respondent in the statement of claim;

(b) with respect, the three reasons relied on by the learned judge namely: (i) not the whole of Dunedin Estate was sold, (ii) the appellant through DW1 had to do a substantial amount of ground work to complete the sale and (iii) the price per square foot was reduced, to award the sum of RM500,000 on a *quantum meruit* basis cannot be correct as it would then be inconsistent with the findings of fact and the law on the issue of liability held in favour of the respondent;

(c) at the expense of repetition, we state that the respondent was not in breach of the terms of the letter of appointment by not securing a purchaser for the whole of the Dunedin Estate at a minimum price of RM5 per sqft. Further, PW2 had discharged the duties required of her and although DW1 himself had done a substantial amount of ground work to complete the sale, this does not detract from our finding that the respondent was the effective cause of the sale and purchase agreement. On the evidence before the court it is clear that, in terms of cause and effect, PW2 was the effective cause of the ultimate sale. She was the sole

effective cause as there is no evidence to show the break in the chain of causation on the basis of cause and effect;

(d) the court is of the view that in this case the respondent is entitled to the full fees even if the ultimate sale was at a lower price than initially agreed. Support for this view can be found in *Halsbury's Laws of England*, (4th Ed), Vol 1 at p 482 where it was stated that 'The rule that an agent is entitled to remuneration when his intervention was the effective cause in bringing about the transaction between the principal and the third party is exemplified in cases where an agent has been held entitled to a commission upon sale to a purchaser introduced by him, or through him by other agents, although the sale was effected directly between the principal and the third party, at a lower price than the minimum stated to the agent'; and

(e) there is a plethora of cases on the obligation of the appellant to make compensation to the respondent for enjoying the benefit of the services of PW2 pursuant to s 71 of the Contracts Act 1950. The facts of the present case clearly fulfill the requirements for the respondent to invoke the provisions of s 71. Firstly, it was undisputed that the respondent had provided services to the appellant. Secondly, the services provided by PW2 were never intended to be gratuitous and thirdly, the appellant had benefitted from the services of PW2. On this point it will suffice to refer to the case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 (PC) in support.

[31] It is trite that an appellate court will not, generally, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion (see *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425; [2010] 4 CLJ 203) or when there is a serious misdirection of law or fact by the trial judge (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545). In the present case it is our judgment that the trial court was plainly wrong in arriving at its conclusion to reduce the amount claimed by the respondent in the counterclaim and to award the lump sum of RM500,000 only. There was a serious misdirection of law and fact by the trial judge to proceed to award the sum of RM500,000 on the basis of *quantum meruit* when it was clear that the respondent had proven its case on a balance of probabilities, to be paid its fees in full calculated on 1% of the reduced sale price. Further, the sum of RM500,000 awarded is arbitrary in the circumstances as no basis or reasons have been proferred to support that figure.

[32] In the result, the appeal was dismissed and the cross-appeal allowed. Costs in the sum of RM20,000 was allowed for both the appeal and cross-appeal.

Appeal dismissed and cross-appeal allowed.

Reported by Ashok Kumar